SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No:	SB 212	**Hearing Date:**	April 20, 2021
Author:	Umberg		
Version:	March 10, 2021		
Urgency:	No	**Fiscal:**	Yes
Consultant:	MK		

Subject: ***Prospective jurors for criminal trials: peremptory challenges: elimination***

HISTORY

Source: Author

Prior Legislation: AB 3070 (Weber) Chapter 318, Stats. 2020
SB 843 (Budget) Chapter 33, Stats. 2016
SB 794 (Evans) not heard in Assembly Public Safety
AB 1557 (Feuer) – 2007, died on Assembly Floor Inactive File
AB 886 (Morrow) – 1997-98, never heard by Assembly Judiciary
AB 2003 (Goldsmith) – 1996, failed Assembly Floor
AB 2060 (Bowen) – 1996, never heard by Assembly Judiciary

Support: Unknown

Opposition: American Civil Liberties Union California Action; California Attorneys for Criminal Justice; California Innocence Coalition: Northern California Innocence Project, California Innocence Project, Loyola Project for The Innocent; California Public Defenders Association (CPDA); California United for A Responsible Budget (CURB); Ella Baker Center for Human Rights; Erwin Chemerinsky, Professor of Law; Initiate Justice; Re:store Justice; San Francisco Public Defender; Sanger Swysen & Dunkle - Robert Sanger; Sanger Swysen & Dunkle - Sarah Sanger; We the People - San Diego; Young Women's Freedom Center

PURPOSE

The purpose of this bill is to eliminate peremptory challenges to prospective jurors in criminal cases.

Existing law requires that all persons selected for jury service be selected at random from the population of the area served by the court and that all qualified persons have an equal opportunity to be considered for jury service in the state. (Code of Civil Procedure Sections 191 and 192.)

Existing law allows a juror to be challenged for cause or by a peremptory challenge. A challenge for cause can be: a general disqualification, the juror is disqualified from serving in the action on a trial; implied bias; or actual bias. (Code of Civil Procedure Section 225)

Existing law provides that challenges for cause shall be tried by the court. (Penal Code Section 230)

Existing law provides for the following peremptory challenges:

a) In a criminal case punishable by death or life without parole the defendant and the prosecution are each entitled to 20 peremptory challenges.
b) For any offense punishable by more than 90 days, each side gets 10 peremptory challenges.
c) If there are two or more defendants, challenges are exercised jointly, except each defendant gets 5 additional challenges that can be used separately.
d) If the offense is punishable with a maximum term of 90 days or less, the defendant and the prosecutor are each entitled to 6 peremptory challenges, and if there is two or more defendant each get an additional 4 that they can use separately.
e) In a civil case each party is entitled to 6 peremptories, if there are two or more parties, each side will have 8 peremptories. (Civil Code of Procedure Section 231)

Existing law prohibits a party from using a peremptory challenge to remove a prospective juror on the basis of the assumption that the prospective juror is biased merely because they have a characteristic listed or defined in Government Code Section 11135, or on similar grounds. (Code of Civil Procedure Section 231.5.)

Existing law, as of January 1, 2022, provides that a party shall not use a peremptory challenge to remove a prospective juror on the bases of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups.(Code of Civil Procedure Section 231.7(a))

Existing law, as of January 1, 2022, provides that a party, or the trial court on its own motion, may object to the improper use of a peremptory challenge and that after the objection is made there is a process for the court to determine whether the peremptory was used for an improper purpose. (Code of Civil Procedure Section 231.7)

Existing law, as of January 1, 2022, sets forth reasons for which a peremptory challenge is presumed to be invalid. (Code of Civil Procedure Section 231.7(e))

Existing law provides that a defendant's right to trial by a jury drawn from a representative cross section of the community, as guaranteed by the Sixth Amendment of the federal Constitution and article I, section 16, of the California Constitution, is violated when a "cognizable group" within that community is excluded from the jury venire. In order for a group to be considered cognizable, two requirements must be met: (1) the group's members must share a common perspective arising from their life experience in the group; and (2) it must be shown by the party seeking to prove a violation of the representative cross section rule that no other members of the community are capable of adequately representing the perspective of the group assertedly excluded. (*Rubio v. Superior Court* (1979) 24 Cal.3d 93, 97-98, citing *People v. Wheeler* (1978) 22 Cal.3d 258, 272; see also *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1274.)

Existing law prohibits the State from excluding members of the defendant's race from the jury venire on account of race, or on the false assumption that members of their race as a group are not qualified to serve as jurors. (*Batson v. Kentucky* (1986) 476 U.S. 79, 85-88.)

Existing law prohibits peremptory challenges based on group bias in civil lawsuits in federal district court. (*Edmonson v. Leesville Concrete Co*. (1991) 500 U.S. 614, 630-631.)

Existing law establishes a procedure (a "Batson-Wheeler hearing") whereby the court can address the use of a peremptory challenge (sometimes referred to as a "strike") that is believed to have been made in a discriminatory manner:

a) Requires a party to make a timely objection if they believe the striking party is exercising their peremptory challenges in a discriminatory manner. (*People v. Perez* (1996) 48 Cal.App.4th 1310, 1314.)

b) Requires the trial court to resolve whether or not the objecting party has raised a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." (*Johnson v. California* (2005) 545 U.S. 168.) In reaching this conclusion, many factors may raise an inference of discriminatory intent, including the following:

   i) Where a party has struck most or all members of an identified group or has used a disproportionate number of their peremptory challenges against members of that group. (*People v. Wheeler, supra* at p. 280.)

   ii) Where a party has failed to engage the prospective juror in meaningful questioning. (*Id*. at pp. 280-281.)

This bill would eliminate peremptory challenges to prospective jurors in criminal cases

COMMENTS

1. Need for This Bill

According to the author:

> SB 212 will eliminate peremptory challenges in criminal cases. In *Batson v. Kentucky*, the U.S. Supreme Court sought to eliminate racial bias in jury selection by providing parties the right to object to opposing parties' peremptory challenges. But, as Justice Thurgood Marshall famously observed in his concurring opinion in the case, "[t]he decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely." Some states, California among them, have sought to reduce bias in jury selection by requiring the party making a peremptory challenge to prove it wasn't based on bias rather than the party that objects, and by listing reasons for such challenges that are presumptively invalid. While these efforts are laudable, it's unclear whether they will be effective against a jury selection tool whose sole reason for existence is to allow parties to remove prospective jurors based on their biases. Washington Supreme Court Chief Justice Steven C. González, in his call to abolish peremptory challenges in a 2013 concurrence in *State v. Saintcalle*—the case that led Washington to change its own peremptory rules—noted that while many peremptory challenges are based on generalizations or racial stereotypes, "there is no accurate and reliable way to identify which peremptory challenges are based on race and which are not."

> Eliminating peremptory challenges is admittedly an unpopular proposition with some who think that their intuition/biases benefit their clients or cause, even though evidence shows they are ineffective, provide little if any benefit, and in fact harm our justice system. A Judicial Council study using mock trials demonstrated the ineffectiveness of peremptory challenges (Judicial Council of Cal., Peremptory Challenges in Criminal Misdemeanor Cases (2020), pp. 8-9). Defense attorneys who participated in a mock trial for another study would have done just as well had they exercised their peremptory challenges based on the flip of a coin; prosecutors did only marginally better (*State v. Saintcalle* (2013) 178 Wash.2d 34, 104 (conc. opn. of González, J.)). For all these aforementioned reasons, I have introduced SB 212 to eliminate peremptory challenges in criminal cases, while still allowing attorneys access to unlimited 'dismissals for cause' if the defense or prosecution believes a person cannot be impartial in the case.

2. Peremptory challenges

Peremptory challenges to jurors have been part of the civil law of California since 1851, and were codified in the original Field Codes in 1872. Their previous history in England dates back to at least the Fifteenth Century when persons charged with felonies were entitled to 35 peremptory challenges to members of the jury panel. Peremptory challenges have permeated other nations which have based their systems of justice on English Common Law. Today, nations with roots in English law, such as Australia, New Zealand, and Northern Ireland, continue to utilize peremptory challenges in jury selection.

In 1986, the United States Supreme Court decided *Batson v. Kentucky*, recognizing that the peremptory challenge could be a vehicle for discrimination. Subsequent cases have sought, with some difficulty, to define the limits of inquiry into the motives of the parties in exercise of challenges which might be based on race or gender. In California, under Civil Code Section 231.5, a party may not excuse a juror with a peremptory challenge based on race, color, religion, sex, national origin, sexual orientation or similar grounds. If questioned, the attorney who exercised the potentially discriminatory challenge must provide the court with a lawful and neutral reason for the use of the challenge.

Under the present system, a potential juror may be excused for cause under a number of specified circumstances (generally incompetence, incapacity, and apparent implied or actual bias). One common use of peremptory challenges is to remove potential jurors who meet the legal definition, but who the attorney suspects may be biased or incompetent.

This bill repeals all peremptory challenges in criminal cases. It does so without granting the parties any more ability to ask questions that may lead to information that would result in a juror being dismissed for cause. How much questioning is allowed is still in the hands of the individual judge.

3 .Changes to peremptory challenges after AB 3070 (Weber) Chapter 318, Stats. 2020

Last year the AB 3070 (Weber) was signed into law, it prohibits a party in a criminal case from using a peremptory challenge to remove a prospective juror on the basis of race, ethnicity, gender, and other specified characteristics, and outlines a court procedure for objecting to, evaluating, and resolving improper bias in peremptory challenges. The same rules will apply to civil cases starting in 2026.

As by the California Attorneys for Criminal Justice, this bill repeals this section that was just created last year and has not even taken effect:

> Unfortunately, SB 212 repeals AB 3070 in its entirety. This repeal occurs even before the AB 3070 protocols have been used in a single case. We understand there are many who remain opposed to AB 3070 or are unwilling to comply with the law. This is unfortunate but not unexpected. History teaches us that cutting edge civil rights/racial justice laws are typically the result of hard fought battles that do not end with the stroke of a Governor's pen. We expect that there will be those who continue to criticize the law after it is fully implemented. There may even be those who file legal challenges. Those of us who worked on the bill or know the history of the civil rights/racial justice movement do not expect anything less. Not only does AB 3070 adopt a new legal protocol, it also forces those in our legal system toconfront an uncomfortable truth: that racial bias is prevalent in the day-to-day operations of our courts. AB 3070 forces lawyers, judges, and potential jurors to grapple with what often goes unspoken and this can make many people feel uncomfortable. However, systemic and unstated racial bias is a reality and we must have the courage to identify and deal with it; and this is what AB 3070 forces us to do. Some may argue that those in our court system are ill-equipped to properly implement AB 3070, as it is difficult to navigate the racial dynamics of identifying bias in the exercise of peremptory challenges. That may be true; the AB 3070 protocols may be different, and require a very new type of racial justice assessment. But that is the point. AB 3070 is new, and is different, and that is why, if given the chance, it will be effective.

Should a section that this Committee passed last year be repealed before it even takes effect?

4. Argument in Opposition

The California Innocence Coalition opposes this bill stating:

> We, along with a wide array of criminal justice reform, civil rights, and community-based organizations enthusiastically supported AB 3070 because it offers an effective procedure to end discrimination, especially of Black citizens, in the selection of juries. Dr. Weber and its sponsors, legislative staff, and judges worked on the bill's final language.
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> At the insistence of the judiciary, which wanted ample time for training, AB 3070 will not be implemented until January 1, 2022.
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> SB 212 is an unprecedented attack on this civil rights achievement and would repeal AB 3070 before it is even implemented. The bill would also eliminate peremptory challenges.
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> As you know, AB 3070 was not drafted in a vacuum:
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> - Over the last four decades, our courts have employed the Batson-Wheeler procedure, which was designed to root out intentional acts of discrimination by lawyers when they exercise peremptory challenges to

eliminate prospective jurors. However, the profound failures of the procedure are well-documented. AB 3070 reformed the approach to identify and remedy racial bias in the exercise of peremptory challenges.

- AB 3070 bill was modeled on Washington Supreme Court General Rule 37, adopted in 2018, which was also designed to remedy the very inequities AB 3070 is intended to eliminate. According to Washington Supreme Court Justices Steven Gonzalez and Mary Yu, GR 37 "has served a critical role in judicial education on eliminating racial bias." The Justices expressed their "hope that other states will join our efforts in addressing bias in jury selection."
- The Washington Supreme Court studied the issue before adopting GR 37.The California Legislature passed AB 3070 after considering an exhaustive study of the short-comings of the Batson-Wheeler process in this state's criminal trials. See Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors.
- Whitewashing the Jury Box explored the range of alternatives proposed to reform the Batson-Wheeler procedure, and concluded that AB 3070 is "a practical, workable" means to bring an end to "intractable" racial discrimination in jury selection.

In opposing AB 3070, the author of SB 212 stated that the bill would disadvantage prosecutors. Now, he has invoked the legacy of Justice Thurgood Marshall to challenge AB 3070, which was supported and promoted by many civil rights an racial justice organizations. We note that in 1986, in his concurring opinion in Batson v. Kentucky Justice Marshall discussed the elimination of peremptory challenges, but not because he believed that all peremptory challenges are race-based. Rather his objection was that discrimination was so intertwined with their use that, in essence, the evil could not be excised. However, the studies underlying GR 37 and AB 3070 posited that this can be accomplished. AB 3070 addresses each of Justice Marshall's specific critiques.

At least two significant real-world considerations counsel against the elimination of peremptory challenges at this juncture:

- As Whitewashing the Jury Box and numerous other studies demonstrate, judges have an abysmal track record enforcing Batson. The problem is both one of lack of judicial will and the legal framework that endorses implicit and institutional bias as well as reasons for strikes that are proxies for race. These practices are deeply ingrained, and will infect prosecutors' use challenges for cause and judges' rulings on those challenges. Eliminating peremptory challenges without—as AB 3070 does—explicitly identifying reasons historically associated with race discrimination and erecting legal guardrails limiting their use will simply bleed over into greater tolerance for discrimination in the exercise of cause challenges.
- Eliminating peremptory challenges would also significantly undermine the ability of an accused to secure a fair jury. Under current law, defense attorneys (and prosecutors) are often not allowed sufficient time to question potential jurors to demonstrate a cause challenge because judges are the sole arbiters of how much time attorneys are granted. Peremptory challenges

provide the accused the opportunity to exclude a potential juror who exhibits bias, but has not been questioned adequately.

The California Innocence Coalition is committed to protecting the rights of the innocent and to ensuring our criminal justice system is fair and just. The right of the accused to a jury that fairly reflects their community and the right of all citizens to participate in the jury system is integral to achieving our mission. For these reasons, we strongly oppose SB 212.

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